



**IN THE COURT OF CRIMINAL APPEALS  
OF TEXAS**

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**NO. WR-78,107-02**

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**EX PARTE KOSOUL CHANTHAKOUMMANE, Applicant**

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**ON APPLICATION FOR WRIT OF HABEAS CORPUS  
CAUSE NO. W380-81972-07-HC2  
IN THE 380<sup>TH</sup> DISTRICT COURT  
COLLIN COUNTY**

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**NEWELL, J., filed a dissenting opinion in which RICHARDSON  
and WALKER, JJ., joined.**

In this case, Applicant raises questions about three different types of forensic science evidence used in his capital murder trial and claims he is actually innocent. Of those claims, Applicant's argument that hypnotically refreshed identification information led to unreliable identification testimony deserves further consideration. The Court ought

to file and set this case to thoroughly examine this issue. Because the Court does not, I respectfully dissent.

Hypnosis has been discredited, at least according to one court, as a forensic discipline to uncover forgotten memories of crimes.<sup>1</sup> Although the State's expert testified that the risks associated with using hypnosis to assist with memory recall have been well known in the scientific field since at least the mid-1980s, the risks associated with eyewitness identification have become more apparent over time. As we noted in *Tillman v. State*, eyewitness misidentification is the leading cause of wrongful convictions across the country.<sup>2</sup> And as I've stated before, I cannot imagine that the concerns regarding suggestive eyewitness identification evaporate when eyewitness testimony is enhanced through hypnotism.<sup>3</sup>

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<sup>1</sup> See, e.g., *State v. Moore*, 902 A.2d 1212, 1213 (N.J. 2006) ("Based on the record developed below, and the substantial body of case law that has considered the question since *Hurd* was decided, we have determined that a change in course is now warranted. We are no longer of the view that the *Hurd* guidelines can serve as an effective control for the harmful effects of hypnosis on the truth-seeking function that lies at the heart of our system of justice. Most important, we are not convinced that it is possible to know whether post-hypnotic testimony can ever be as reliable as testimony that is based on ordinary recall, even recognizing the myriad of problems associated with ordinary recall. We therefore conclude that the hypnotically refreshed testimony of a witness in a criminal trial is generally inadmissible and that *Hurd* should no longer be followed in New Jersey.").

<sup>2</sup> 354 S.W.3d 425, 441 (Tex. Crim. App. 2011).

<sup>3</sup> *Ex parte Don Flores*, WR-64,654-02, 2016 WL 3141662, at \*1 (Tex. Crim. App. May 27, 2016) (Newell, J., concurring).

In light of *Tillman*, I believe we should revisit our precedent evaluating the admissibility of hypnotically enhanced testimony.<sup>4</sup> I would file and set this case with briefing by the parties to address that issue. Because this Court does not, I respectfully dissent.

Filed: October 7, 2020

Publish

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<sup>4</sup> See *State v. Medrano*, 127 S.W.3d 781, 782–83 (Tex. Crim. App. 2004) (upholding *Zani* as consistent with *Kelly*; “With *Zani*, the Court provided a mechanism to allow for the admission of hypnotically enhanced testimony and at the same time to ensure that this admitted testimony was reliable.”).